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IN THE
Supreme Court of the United States
OCTOBER TERM, 1973

No. 73 - 1148

**In the matter of the APPLICATION OF CHERYL SPIDER
DeCOTEAU, natural mother and next friend and on
behalf of ROBERT LEE FEATHER and HERBERT JOHN
SPIDER for a WRIT OF HABEAS CORPUS, *Petitioner,***

v.

**THE DISTRICT COUNTY COURT FOR THE
TENTH JUDICIAL DISTRICT, *Respondent.***

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA**

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STATE OF SOUTH DAKOTA**

Petitioner, Cheryl Spider DeCoteau, respectfully
prays that a Writ of Certiorari be granted to review
the judgment and opinion of the South Dakota
Supreme Court, entered in this case on October 31,
1973.

OPINIONS BELOW

The opinion of the South Dakota Supreme Court is
reported at 211 N.W.2d 843 (1973) and printed in
Appendix A. The Findings of Fact and Conclusions

of Law and Judgment of the South Dakota Circuit Court for the Fifth Judicial Circuit are unreported. They are printed in Appendix B.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. 1257(3). The final judgment of the Supreme Court of the State of South Dakota was entered on October 31, 1973. In accordance with 28 U.S.C. 2101(e), this petition for a writ of certiorari is due on or before January 29, 1974.

QUESTION PRESENTED

WHETHER THE STATUS OF THE PATENTED PORTIONS OF A SOUTH DAKOTA INDIAN RESERVATION AS INDIAN COUNTRY WAS TERMINATED, AND STATE CIVIL JURISDICTION IMPOSED OVER INDIANS THEREON, BY A FEDERAL LAW WHICH PROVIDED FOR NON-INDIAN HOMESTEADING OF THE UNALLOTTED AND UNRESERVED TRIBAL "SURPLUS" LANDS ON SAID RESERVATION.

STATUTES INVOLVED

Articles 3 and 10 of the Treaty of February 19, 1867, 15 Stat. 505, Sections 26-30 of the Act of March 3, 1891, 26 Stat. 989, 1035, and 18 U.S.C. 1151 are set out in Appendix C.

STATEMENT OF THE CASE

On December 17, 1971 South Dakota brought dependency and neglect proceedings against Cheryl Spider DeCoteau, an enrolled member of the Sisseton-Wahpeton Sioux Tribe. The State sought to terminate the parental rights of Mrs. DeCoteau to her minor children, Robert Lee Feather and Herbert John

Spider. All of the incidents constituting the alleged dependency and neglect had occurred within the exterior boundaries of the Lake Traverse Reservation, as established under the 1867 Treaty, approximately 50 percent of the incidents occurring on federal trust lands and approximately 50 percent of the incidents occurring on "surplus" lands opened for homesteading in 1891 and patented to non-Indians. None of the incidents occurred on land (sections 16 and 36) set aside for common school purposes by the act of March 3, 1891.

The District County Court for the Tenth Judicial District assumed jurisdiction, and, on December 17, 1971, entered an order of temporary foster care for Herbert John Spider. On August 4, 1972, Mrs. DeCoteau moved the District County Court to dismiss the proceedings on the ground that all the incidents giving rise to said proceedings involved Indians and occurred in Indian Country and that, therefore, the Court lacked jurisdiction. The motion was denied on August 29, 1972, the Court ruling that the state courts have jurisdiction over Indians for actions occurring on non-Indian patented lands within the confines of the reservation.

On August 4, 1972 the District County Court continued its December 17, 1971 custody order with respect to Herbert John Spider and issued a custody order that Robert Lee Feather remain in the foster care arranged for him by South Dakota since March 12, 1971.

On August 31, 1972 Cheryl Spider DeCoteau petitioned the South Dakota Circuit Court for the Fifth Judicial Circuit for a writ of habeas corpus. That

Court found that petitioner and her children are duly enrolled members of the Sisseton-Wahpeton Sioux Tribe located on the Indian reservation where all of the alleged acts or omissions resulting in the dependency and neglect proceedings and custody orders occurred. The Court ruled, however, that incidents occurring on non-Indian patented lands within the treaty boundaries of the Lake Traverse Reservation did not take place in "Indian Country," and that, therefore, the District County Court's exercise of dependency and neglect jurisdiction and issuance of custody orders were proper. Accordingly, the Circuit Court denied the writ of habeas corpus.

Cheryl Spider DeCoteau appealed, assigning as error the Circuit Court's "conclusion of law . . . stating that the District County Court for the Tenth Judicial District has civil dependency and neglect jurisdiction over members of the Sisseton-Wahpeton Sioux Tribe residing within the exterior boundaries of the Lake Traverse Indian Reservation as established by the Treaty of February, 1867 when certain acts or omissions constituting a cause of action under the dependency and neglect laws of the State of South Dakota occur on non-Indian patented lands within the boundaries of said Reservation."

On October 31, 1973 the South Dakota Supreme Court filed its opinion affirming the Circuit Court's judgment. The Supreme Court ruled that the Act of March 3, 1891 disestablished the reservation status of the non-Indian patented portions of the Lake Traverse Reservation. In effect, the Court below further ruled that these portions of the 1867 treaty reservation are not Indian Country within the meaning of 18 U.S.C. 1151.

REASONS FOR GRANTING THE WRIT

I. The Ruling of the Supreme Court of the State of South Dakota Directly Conflicts with a Decision of the Eighth Circuit Court of Appeals Construing the Identical Federal Statute

The holding of the court below that Lake Traverse Reservation "surplus" lands opened to non-Indian settlement by the Act of March 3, 1891, 26 Stat. 989, 1035, are no longer within Indian Country, and that, therefore, Indians who commit acts or omissions in contravention of state laws on such lands are subject to the jurisdiction of state courts is in direct and irreconcilable conflict with the decision of the Court of Appeals for the Eighth Circuit in *United States ex rel. Feather v. Erickson*,—F.2d—(CA 8 December 7, 1973). (The decision of the Eighth Circuit is printed in Appendix D.)

In *Feather*, the Federal court, construing the identical 1891 statute as the court below, held that "the boundaries of the Lake Traverse Reservation remain as they were established in 1867," and, therefore, that an offense committed by an Indian on non-Indian patented lands within such boundaries had occurred in Indian country and was not subject to State jurisdiction. The statutory background of this decision, and of the contrary holding of the South Dakota Supreme Court is as follows:

The Lake Traverse Indian Reservation was established by the Treaty of February 19, 1867, 15 Stat. 505. It was set apart as a "permanent" reservation. 15 Stat. 505, 506 (Art. 3). In 1874 the United States reaffirmed its commitment to maintain a permanent Lake Traverse Reservation. Act of June 24, 1874, 18 Stat. 167.

Between 1867 and 1891 no laws affected the boundaries of the permanent Lake Traverse Reservation. Then, in 1891, a law was enacted which is the crux of this litigation.

The Act of March 3, 1891, c. 543, 26 Stat. 989, 1035, follows the general pattern of surplus land statutes enacted between 1890 and 1910. The Act provided for allotments to each Indian who had not been allotted; for withholding lands for religious purposes; for setting aside Sections 16 and 36 in each township for common school purposes; and for the remaining "surplus" lands to be subject to entry under the homestead and townsite laws. The United States acted as trustee and credited the proceeds of the land sales to the trust account of the Tribe, with the funds to be used for the education and civilization of the Sisseton and Wahpeton Sioux Indians.

The South Dakota Supreme Court ruled that the 1891 Act dis-established the reservation status of the non-Indian patented lands within the 1867 Treaty boundaries of the Lake Traverse Reservation, summarizing its view in the following language. (Appendix A, p. 4a):

By the very terms of this Agreement, the Sisseton and Wahpeton Bands of Indians sold their unallotted lands, and the United States Government paid a sum certain for each and every acre purchased. The money was deposited in the United States Treasury and the United States agreed to pay interest thereon. All the money was to be used for the sole benefit of the Indians. This then was an outright cession and sale of lands by the Indians to the United States. The land sold was separated from the reservation by Congress and became part of the public domain. In this Agreement the United States did not contract to act as trustee to sell the land for the Indians and

credit the proceeds to the tribe. The government agreed to purchase the land outright. Therefore, the tribal title was extinguished and the reservation disestablished. The unallotted lands so sold are no longer in "Indian Country."

This statement by the South Dakota Supreme Court contravenes the 1867 Treaty and is irreconcilable with and a misconstruction of 18 U.S.C. 1151 which defines Indian Country as including "all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent." The decision of the court below is based primarily on a construction of Section 30 of the 1891 Act that the "lands ceded and sold would be subject to the laws of the State of South Dakota." The relevant portion of Section 30 states (Appendix C, p. 20a):

That the lands of said Agreement ceded, sold, relinquished and conveyed to the United States shall immediately . . . be subject only to entry and settlement under the homestead and townsite laws of the United States excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the state wherein located.

In *United States ex rel. Feather v. Erickson*, *supra*, the Eighth Circuit, overruling an earlier decision,¹ held that the Act of March 3, 1891 merely opened for settlement the unallotted and unreserved "surplus"

¹ *DeMarrias v. State of South Dakota*, 319 F.2d 845 (1963). The Act of March 3, 1891 has had a long prior history of judicial interpretation. *Application of DeMarrias*, 91 N.W.2d 480 (S.D. 1958); *State v. DeMarrias*, 107 N.W.2d 255 (S.D. 1961), cert. denied, 368 U.S. 844 (1961); *DeMarrias v. State of South Dakota*, 206 F. Supp. 549 (D.S.D. 1962); and the Eighth Circuit *DeMarrias* decision, *supra*. The South Dakota Supreme Court in its October 31, 1973 decision placed primary reliance on the federal *DeMarrias* decisions, now overruled.

lands within the Lake Traverse Reservation. The reservation, according to the Court, was not sold to the government outright and no portion of it was terminated. Construing the "subject to the laws of the state" clause in Section 30 of the 1891 Act, the Eighth Circuit stated that "in light of the general pattern adopted by Congress in making specific grants of these numbered sections in each township to the states," the clause most plausibly subjected only school lands to the laws of the state. Thus, based upon the legislative history, subsequent legislative treatment of the reservation, and the clear reservation termination language of contemporaneous enactments, the Federal court found that the clause did not express or clearly imply a Congressional intention to terminate the reservation status of the Lake Traverse lands opened for settlement. When reservations were abolished, more direct language was used.²

In addition to a direct conflict with *Feather*, the holding of the South Dakota Supreme Court is also irreconcilable with *The City of New Town, North Dakota v. United States*, 454 F.2d 121 (CA8 1972) and *United States ex rel. Condon v. Erickson*, 478 F.2d 684 (CA8 1973),³ decisions where the Eighth Circuit, on closer factual situations analogous in all material respects to the Lake Traverse Reservation, found that the "surplus" lands opened for settlement on the Fort Berthold and Cheyenne River reservations respectively are in Indian Country. Although the reasoning in *Condon* compels a finding that the

² In 1874, for example, when Congress abolished certain reservation holdings of the Sisseton-Wahpeton Sioux, it used the words "ceded absolutely to the United States." Act of June 24, 1874, 18 Stat. 167.

³ This Court cites *Condon* favorably in *Mattz v. Arnett*, — U.S. —, 93 S.Ct. 2245, fn. 23 (1973).

Lake Traverse Reservation is undiminished, the South Dakota Supreme Court never discussed *Condon*.

In summary, the decision of the court below presents a direct conflict with holdings of the Court of Appeals for the Eighth Circuit which only this Court can resolve.

II. The Decision of the Court Below Is Inconsistent with This Court's Ruling in *Mattz v. Arnett* that Indian Reservations Are Not Abolished by Federal Laws Which Merely Permit Non-Indian Homesteading of "Surplus" Reservation Lands.

The holding of the South Dakota Supreme Court is completely inconsistent with the decision of this Court in *Mattz v. Arnett*, ——— U.S. ———, 93 S.Ct. 2245 (1973). *Mattz* held that the Klamath River Reservation was not terminated under an 1892 act providing for sale to the public of all unallotted, unreserved and unsettled lands "embraced in what was Klamath River Reservation" with payment of the proceeds to the Indians' benefit.

Although the 1891 Lake Traverse Reservation act is similar in purpose and effect to the act construed in *Mattz*, it more easily provides support for the position that portions of reservations owned by non-Indians are not terminated. Unlike the Klamath River Reservation, burdened with a legislative history of pre-1892 attempts to terminate it and with the fact that the Indians for whom the reservation was set aside had virtually abandoned it, the legislative history and continuous Indian occupation of the Lake Traverse Reservation unambiguously emphasize the fact that no portion of the permanent reservation has ever been terminated.

Mattz clearly controls the Lake Traverse Reservation situation. Yet, the South Dakota Supreme Court never mentioned *Mattz*.

CONCLUSION

The Lake Traverse Reservation was established by treaty in 1867. It has been Congressionally recognized and administered as an undiminished reservation ever since, as evidenced by repeated annual appropriations to support tribal activities throughout the treaty reservation. The 1891 Act does not indicate a purpose to withdraw federal authority over those portions of the reservation opened to non-Indian settlement.

Since large numbers of Sisseton-Wahpeton Sioux reside on the "surplus" lands, State assertion of jurisdiction infringes substantially on the sovereign treaty right of the Sisseton-Wahpeton Sioux to make their own rules and be governed by them, within an undiminished reservation. Indeed, a different conclusion would irreparably interfere with essential tribal relations, and impair the effective functioning of the Sisseton-Wahpeton Sioux as a tribe.

For the reasons set forth in this petition, Cheryl Spider DeCoteau, petitioner, urges this Court to issue a writ of certiorari to the Supreme Court of the State of South Dakota and also to reverse summarily the decision of that Court on authority of *Mattz v. Arnett*, *supra*, and *United States ex rel. Feather v. Erickson*, *supra*.

Respectfully submitted,

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